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ATTORNEY FOR APPELLANT:

**SUSAN D. RAYL**  
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

**STEVE CARTER**  
Attorney General Of Indiana

**MAUREEN ANN BARTOLO**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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CARNELL GILBERT,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 49A02-0412-CR-1059

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable David Shaheed, Judge  
Cause No. 49G14-0406-FD-100176

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**December 27, 2005**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

Carnell Gilbert is charged with possession of cocaine, a Class D felony. Before trial, Gilbert made a motion to suppress evidence, which the trial court denied after a hearing. Gilbert has properly initiated an interlocutory appeal of the trial court's order.<sup>1</sup> We affirm.

### Issue

Gilbert raises one issue for our review, which we restate as whether the trial court properly denied his motion to suppress.

### Facts and Procedural History

On June 5, 2004, Officer Greg Milburn of the Indianapolis Police Department was traveling behind Gilbert at the intersection of East Roosevelt Avenue and North Dearborn Street in Indianapolis. As Gilbert's vehicle crossed railroad tracks, part of it loosened and was dragged along the roadway.<sup>2</sup> Officer Milburn watched as Gilbert pulled to the roadside and crawled under the vehicle, his legs protruding into the street. Concerned that another driver would "come by and take [Gilbert's] legs off" because the intersection is heavily traveled, Officer Milburn activated his vehicle's emergency lights and stopped approximately one car length behind Gilbert. Transcript at 6.

Officer Milburn then approached Gilbert, who continued making repairs, to "ask him what was going on." Id. at 6. He requested Gilbert's identification and returned to his patrol car, where he performed a check for criminal history and warrants. Id. at 9. Although

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<sup>1</sup> We thank counsel on both sides for their oral arguments, made on November 10, 2005, at the Walden Inn Social Center in the presence of DePauw University students, faculty, and guests. We also thank DePauw University for hosting the argument.

Officer Milburn could not recall if Gilbert provided a physical form of identification, Gilbert testified that he “went right in his wallet and gave [Officer Milburn his] ID.” Id. at 9, 11. Gilbert also testified that he was handcuffed immediately after Officer Milburn retrieved his identification, and remained handcuffed while the officer returned to his vehicle and ran checks. Id. at 11. Officer Milburn, on the other hand, did not testify whether or when he used handcuffs.

The warrant check revealed that Gilbert had an outstanding warrant for driving with a suspended license. Officer Milburn subsequently arrested Gilbert, who was advised of his rights and acknowledged that he understood them. Officer Milburn then asked Gilbert if he had any guns, knives, drugs, or weapons. Gilbert admitted he had cocaine in his pocket, which he planned to use as payment to a mechanic for repairs to his vehicle. Later that day, Gilbert was charged with possession of cocaine. Before commencement of trial, he moved to suppress any evidence Officer Milburn discovered during his detention and arrest. The trial court denied the motion, and Gilbert now appeals.

### Discussion and Decision

#### I. Standard of Review

We review the denial of a motion to suppress in a manner similar to instances in which the sufficiency of the evidence is challenged. Bell v. State, 818 N.E.2d 481, 484 (Ind. Ct. App. 2004), trans. denied. To this end, we will not reweigh the evidence or judge witness credibility. Id. We will consider the evidence most favorable to the trial court’s ruling while

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<sup>2</sup> Officer Milburn testified that the vehicle’s makeshift wooden rear bumper had fallen from the

also considering uncontested evidence favorable to the defendant. Id. In doing so, “we must review the totality of the circumstances[,] thereby requiring this court to review all the facts and circumstances that are particular to this case.” Id. We will disturb the trial court’s ruling on a motion to suppress only upon a showing of abuse of discretion. Wright v. State, 766 N.E.2d 1223, 1229 (Ind. Ct. App. 2002).

## II. Validity of Officer Milburn’s Actions

On appeal, Gilbert argues his detention prior to arrest violated both the Fourth Amendment of the United States Constitution and Article 1, Section 11, of the Indiana Constitution because Officer Milburn did not have a reasonable suspicion of criminal activity, and his actions were not reasonable under the circumstances. The State argues Officer Milburn did not require reasonable suspicion for his actions to be legally valid, and his actions were reasonable.

### A. Validity Under the Fourth Amendment

“The Fourth Amendment regulates nonconsensual encounters between citizens and law enforcement officials and does not deal with situations in which a person voluntarily interacts with a police officer.” Finger v. State, 799 N.E.2d 528, 532 (Ind. 2003). Although an arrest or lengthy detention requires probable cause, and an investigatory stop requires reasonable suspicion, a casual or brief inquiry during a consensual encounter does not implicate any Fourth Amendment interests. Id.

Gilbert asserts that “[t]he encounter began as a consensual encounter but escalated to a

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driver’s side; Gilbert testified that it was his muffler.

detention even though Officer Milburn had no reasonable suspicion that Mr. Gilbert was involved in criminal activity.” Brief of Appellant at 9. However, the State contends “Officer Milburn did not conduct a ‘stop’ under the Fourth Amendment[,]” and therefore did not need reasonable suspicion to approach Gilbert and request identification. Brief of Appellee at 5. In its ruling on Gilbert’s motion to suppress, the trial court found that Officer Milburn “stopped out of concern” for Gilbert’s safety, and that the Fourth Amendment was not implicated when the officer asked for Gilbert’s identification. Appendix of Appellee at 1-2.

An encounter between a citizen and the police is consensual if a reasonable person would feel able to “‘decline the officers’ requests or otherwise terminate the encounter.’” Sanchez v. State, 803 N.E.2d 215, 220 (Ind. Ct. App. 2004), trans. denied, (quoting Florida v. Bostick, 501 U.S. 429, 439 (1991)).

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.

U.S. v. Mendenhall, 446 U.S. 544, 554 (1980). The United States Supreme Court has indicated that “[i]n the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.” Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 124 S.Ct. 2451, 2458 (2004). However, our supreme court has held an encounter remains consensual once an officer requests a driver’s license only until the officer fails to return the identification after running checks. Finger, 799 N.E.2d at 532. Even so, “[i]f a person’s freedom to leave is restricted by something other

than police authority, it cannot be said that the police detained the person.” Id. at 533.

Gilbert argues he was under detention after Officer Milburn took his identification, prior to his arrest. He testified he did not feel free to leave, Tr. at 11, and maintains “[n]o reasonable citizen of Indiana would believe that [he] would not have been arrested for fleeing if he had gotten back into his car and driven away” after the officer stopped behind him, activated the emergency lights, and took his identification.<sup>3</sup> Br. of Appellant at 9. The State counters that Officer Milburn’s actions were those a reasonable person would expect of an officer coming upon a stranded motorist in an unsafe location.<sup>4</sup>

Gilbert concedes that a law enforcement officer may routinely request and check a person’s identification. Despite that Gilbert felt unable to refuse or leave, the legal fiction supporting Gilbert’s right to refuse Officer Milburn’s request for identification—that all citizens are aware of their right to refuse such a request—has not been called into question. This is because it is counterbalanced by an applicable statute requiring a citizen’s compliance with a law enforcement officer in a traffic setting. Ind. Code § 9-21-8-1 (“It is unlawful for a

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<sup>3</sup> Gilbert bases this argument upon Indiana Code section 35-44-3-3(a)(3), which discusses resisting a law enforcement officer by fleeing. See also Overstreet v. State, 724 N.E.2d 661, 665 (Ind. Ct. App. 2000), trans. denied, (Robb, J., dissenting) (“Despite our many statements to the contrary, I do not think that any reasonable person, when approached by a police officer and questioned about his activities, would honestly feel free to refuse to answer or to leave. And even more to the point, how many people know that they have such a right? Could not refusing to cooperate be sufficient to arouse suspicion and warrant further investigation?”).

<sup>4</sup> See Finger, 799 N.E.2d at 533 (stating that where an officer parks behind a vehicle, activates his emergency lights, and asks questions, including for identification and whether assistance is needed, the officer is engaged in activities expected of a police officer upon finding a stranded motorist, and which do not indicate to a reasonable motorist that the officer intends to detain him). The State premises its “welfare stop” argument in part upon Indiana Code section 9-21-8-35(a) and (b), concerning precautionary measures required of drivers approaching emergency vehicles, even though Officer Milburn referred to the incident as a “traffic stop” in his probable cause affidavit. Appellant’s Appendix at 11.

person to knowingly fail to comply with a lawful order or direction of a law enforcement officer invested by law with authority to direct, control, or regulate traffic.”). As such, to the extent this legal fiction pertains to a traffic stop, it is not determinative here.

Central to Gilbert’s claim that he was detained is his testimony that he was handcuffed by Officer Milburn immediately after the officer obtained his identification, and while waiting for the results of the check on his identification prior to arrest. Gilbert argues this is “uncontradicted and must be considered” in the evaluation of his claim. Br. of Appellant at 10. The State concedes that Officer Milburn was not questioned regarding the use of handcuffs. Regardless, the State contends we need not “accept such testimony as true, simply because it is not directly contradicted or denied by other testimony.” Br. of Appellee at 9. In holding to our standard of review, we presume the trial court afforded adequate weight to Gilbert’s testimony in ruling on the motion to suppress, although it did not make a specific finding of fact on the issue of whether Gilbert was handcuffed at the time Officer Milburn checked Gilbert’s identification. We will not reweigh the evidence or reconsider witness credibility.

Additionally, Gilbert asserts that Officer Milburn did not return his identification, changing the consensual encounter into something more and violating his Fourth Amendment protections. The facts indicate, however, that when Officer Milburn returned from his patrol car, he had probable cause for an arrest because of Gilbert’s outstanding warrant. See Finger, 799 N.E.2d at 533 (explaining that retention of a driver’s license converted a consensual encounter into an investigative stop, but the officer had reasonable suspicion to detain

defendant for a brief investigative period and therefore did not violate the Fourth Amendment). As such, Officer Milburn need not have returned Gilbert's identification because he had probable cause for the arrest. Gilbert's Fourth Amendment protections were not violated.

#### B. Validity Under the Indiana Constitution

Gilbert also submits that Officer Milburn's actions violated Article 1, Section 11, of the Indiana Constitution.<sup>5</sup> The record does not indicate Gilbert made this argument in his motion before the trial court, and therefore it is waived on appeal.<sup>6</sup> Carroll v. State, 822 N.E.2d 1083, 1088 (Ind. Ct. App. 2005) (holding that issue of legality under Article 1, Section 11, was waived "because it required a separate and distinct analysis under that provision").

Waiver notwithstanding, this provision of the Indiana Constitution must be liberally construed to protect Gilbert from unreasonable police activities. State v. Gerschoffer, 763 N.E.2d 960, 965 (Ind. 2002). The burden is "on the State to show that, under the totality of the circumstances[,], its intrusion was reasonable." Id.

The State argues that Officer Milburn acted reasonably in light of the circumstances

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<sup>5</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Id.

<sup>6</sup> Although the transcript of the hearing on the motion to suppress evidence and the trial court's entry on the motion are included in the record, the motion itself is not. Article 1, Section 11, was not mentioned in the trial court's order, and the arguments presented by Gilbert at the hearing did not directly rely upon the Indiana Constitution.



when he pulled behind Gilbert's vehicle, activated his patrol car's emergency lights, and requested Gilbert's identification. All these actions, the State asserts, are expected of a police officer encountering a stranded motorist. By contrast, Gilbert argues that Officer Milburn in fact did not render aid or offer assistance. Rather, even though Officer Milburn testified Gilbert had committed no traffic violation, he requested identification. Gilbert contends that Officer Milburn's actions were unreasonable because he had "no reason . . . to be wary of Gilbert[,]” who was not acting suspiciously, and that “surely it is not necessary to check for warrants on every citizen who has car trouble in Indiana before offering assistance.” Br. of Appellant at 13.

Gilbert's rights under Article 1, Section 11, were not violated. The State met its burden of establishing that Officer Milburn's actions were consonant with providing a citizen with roadside assistance, as the trial court recognized in its findings. Moreover, Gilbert has conceded that a law enforcement officer may request and check a citizen's identification. Therefore, the trial court properly concluded the evidence discovered by Officer Milburn should not have been suppressed under Article 1, Section 11.

### Conclusion

The evidence most favorable to the trial court's ruling indicates that the encounter between Gilbert and Officer Milburn was consensual until Gilbert was arrested on an outstanding warrant. Because sufficient evidence exists to support the trial court's denial of Gilbert's motion to suppress evidence, we affirm.

Affirmed and remanded for further proceedings.

NAJAM, J., and MATHIAS, J., concur.